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No. 83-705

Supreme Court of the United States

October Term, 1983

WERNER DIRON,
Petitioner,

vs.

CITY OF EASTLAKE,

and

MORRIS BECKER, Individually and as Mayor of the City of Eastlake,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does Petitioner's Failure To Make A Claim For Reinstatement And Back Pay For A Period Of Two (2) Years, Coupled With His Application For And Receipt Of Retirement Benefits From October 1, 1978, To The Present Time Bar This Action As A Matter Of Law?

II. Does Petitioner's Admitted Position As Head Of The Department Of Sanitation For The City Of Eastlake Preclude Any Contention That He Had A Legitimate Claim Of Entitlement To Continued Employment Under Ohio Law?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On July 31, 1980, Petitioner commenced this action in the United States District Court for the Northern District of Ohio, Eastern Division. On July 29, 1983, the District Court granted Respondents' Motion for Summary Judgment (See Petition, p. 30).

On August 1, 1983, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court (See Petition, p. 27).

JURISDICTIONAL STATEMENT

Petition filed a Petition for a Writ of Certiorari on October 27, 1983, pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner maintains that Fourteenth Amendment rights were infringed. In addition, Petitioner claims the applicability of 42 U.S.C. 1983, Ohio Revised Code §§2305.09, 2305.14, 124.11, 124.34, Charter of Eastlake Article VII, Civil Service, Section 1, General Provisions, and Eastlake Ordinance No. 1978-243.

STATEMENT OF THE CASE

In August, 1978, Petitioner held the position of and was paid as a Superintendent of the Eastlake, Ohio Sanitation Department. He was head of his department. Petitioner admitted that he held the highest position in the department, that everyone in the department reported to him, and that he reported only to the Service Director who had jurisdiction over all of the City's service departments.

On August 7, 1978, Petitioner was informed by Mayor Morris Becker that he should either retire from employment with the City of Eastlake or that he would have to be laid off. Petitioner initially elected to be laid off.

The following day, August 2, 1978, Petitioner received a telephone call at his home from David Miller, the Finance Director for the City of Eastlake. During the course

of that conversation, Petitioner learned that Mr. Miller, on behalf of Mayor Becker, had offered to allow him to return to his position as Superintendent of the Sanitation Department if Petitioner would agree to retire voluntarily from the City's employment effective September 22, 1978.

Petitioner gave the matter some thought and decided to accept the Mayor's offer as related to him by the Finance Director. On August 3, 1978, he returned to his job with the City and at that time executed a writing which stated that he would voluntarily retire from the employment of the City effective September 22, 1978.

On January 10, 1979, as a cost saving measure, the Council of the City of Eastlake formally abolished the position of Superintendent of the Sanitation Department.

Immediately following Petitioner's retirement on September 22, 1978, he applied for benefits from the State of Ohio Public Employees Retirement System. In due course, Petitioner received a certificate from the Public Employees Retirement Board indicating that payment of benefits to the plaintiff commencing October 1, 1978, had been approved. Petitioner received the following amounts in each of the stated years:

1978 — $ 1,291.62
1979 — $ 5,106.09
1980 — $ 5,258.13

Indeed, Petitioner has continued, up to the present time, to receive retirement benefits.

On July 31, 1980, Petitioner commenced this action against the City of Eastlake and Mayor Becker.

ARGUMENT

I. PETITIONER'S LACHES IN FILING THIS ACTION, ACQUIESCENCE IN HIS RETIREMENT, AND APPLICATION FOR AND RECEIPT OF PUBLIC EMPLOYEES RETIREMENT SERVICE BENEFITS FROM OCTOBER 1, 1978, TO THE PRESENT TIME, BAR THIS ACTION AS A MATTER OF LAW.

A. Uncontested Facts.

By August 3, 1978, Petitioner had actual knowledge that he would be required to resign and retire from City employment on September 22, 1978—more than six weeks in the future. Although Petitioner now contends that this course was unacceptable to him, the fact is that instead of pursuing an administrative or judicial remedy, Petitioner chose to apply for retirement benefits from the State of Ohio Public Employees Retirement System. The Public Employees Retirement Board of the State of Ohio commenced paying benefits to Petitioner on October 1, 1978, and Petitioner has continued to receive retirement benefits to the present.

B. The District and Circuit Courts Correctly Applied the Law of Ohio.

In *State, ex rel. Sheets v. Portsmouth,* 143 Ohio St. 302 (1944) city council passed an ordinance providing that all members of the police and fire departments be honorably retired at age sixty-five. Sheets, a classified employee, reached the age of sixty-five on the day the ordinance took effect. On that day, the city manager wrote to Sheets advising him that he was honorably retired subject to his

pension rights. Although Sheets was appointed acting chief of police for a period of time, he voluntarily requested that he be placed on the pension rolls—just as did Petitioner in the case at bar. Sheets was enrolled and received monthly pension checks for over two years. Subsequently, the Ohio Supreme Court held the City's retirement ordinance invalid. Sheets then filed a mandamus action seeking reinstatement. He alleged that the cause of his two year delay in filing the mandamus action seeking reinstatement was that he believed in good faith that the City ordinance was a valid enactment. The Ohio Supreme Court held that Sheets' voluntarily act in assenting to his retirement by application for and receipt of police pension benefits constituted a waiver of his rights under G.C. 486-17(A)—the predecessor to Section 124.34 Ohio Revised Code. In denying Sheets' application for a writ of mandamus restoring him to his former job, the Ohio Supreme Court held:

> ". . . Relator, however, by his conduct, at the time of his retirement, waived a right of action for his restoration; he could have refrained from acquiescing, withheld his consent, and not applied for a pension and then immediately brought his proceeding for restoration. Acting upon the assumption that the ordinance was valid, he took the course he did. His assumption of the validity of the ordinance, though based upon advice of counsel and the court decision referred to, cannot reinvest him with a right of action, which he yielded when he voluntarily retired and accepted the pension. The writ is denied and the petition dismissed." *Sheets* at p. 304.

See: *State, ex rel. Moore v. Sanders,* 65 Ohio St. 2d 72 (1981) (delay of twenty months held fatal to plaintiff's action); *State, ex rel. Stoer v. Raschig,* 141 Ohio St. 477 (1943) (civil servant who waited eleven months after

dismissal barred from reinstatement because of laches—particularly since, as in the case at bar, plaintiff's former position was abolished in the interim. *Stoer* at p. 488); *State, ex rel. Bauer v. Director of Agriculture*, 12 Ohio L. Abs. 481 (1932, Franklin County) (delay of seven months barred plaintiff's action).

Under the controlling law of Ohio Appellant's conduct clearly bars this action.

C. The Decision of the Sixth Circuit Is Clearly Consistent With the Decisions of This Court and Other Circuits.

In *United States, ex rel. Arant v. Lane*, 249 U.S. 367, 63 L. Ed. 650, 39 S. Ct. 293 (1918), Arant, who claimed to be a classified civil service employee of the Federal Government, was first requested to resign and subsequently forcibly ejected from office on July 20, 1913. On April 30, 1915, approximately 21 months later, Arant filed a mandamus action. This Court stated:

> "Under circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to effectively assert his claim for reinstatement to office for almost two years. Such a long delay must necessarily result in changes of the branch of the service to which he was attached, and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy." *Arant* at p. 372.

In holding that Arant's claim was barred by laches, the court fastened upon "considerations of public policy." A public employee:

"Should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified, the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service." *Arant* at p. 372.

In *Baskin v. TVA*, 382 F. Supp. 641 (M.D. Tenn. 1974), the District Court held that a delay of 27 months constituted laches barring the action. The Court referenced *Arant v. Lane, supra*, and listed a number of parallel cases.

"In addition to the *Lane* case, delays by discharged federal employees in bringing suit were held to constitute laches and a bar to the actions in the following cases: *Norris v. United States*, 257 U.S. 77, 42 S. Ct. 9, 66 L. Ed. 136 (1921) (11 months' delay); *Nicholas v. United States*, 257 U.S. 71, 42 S. Ct. 7, 66 L. Ed. 133 (1921) (3 years' delay); *Grasse v. Snyder*, 89 U.S. App. D.C. 352, 192 F.2d 35 (1951) (16 months' delay); *Caswell v. Morgenthau*, 69 App. D.C. 15, 98 F.2d 296, *cert. denied*, 305 U.S. 596, 59 S. Ct. 81, 83 L. Ed. 378 (1938) (18 months' delay); *Haas v. Overholser*, 96 U.S. App. D.C. 22, 223 F.2d 314 (1955) (24 months' delay); *Chiriaco v. United States*, 235 F. Supp. 850 (N.D. Ala. 1963), *aff'd.* 339 F.2d 588 (5th Cir. 1964) (24 months' delay); *Drown v. Higley*, 100 U.S. App. D.C. 326, 244 F.2d 774 (1957) (27 months' delay); *Brown v. United States*, 418 F.2d 442 (5th Cir. 1969) (28 months' delay); *United States ex rel. Cromwell v. Doyle*, 69 App. D.C. 215, 99 F.2d 448 (1938), *cert. denied*, 306 U.S. 640, 59 S. Ct. 488, 83 L. Ed. 1041 (1939) (30 months' delay); *Davis v. Tennessee Valley Authority*, 214 F. Supp. 229 (N.D. Ala. 1962), *aff'd.* 313 F.2d 959 (5th Cir.), *cert. denied*, 375 U.S. 818, 84 S. Ct. 53, 11 L. Ed. 2d 52 (1963) (20

months' delay before filing suit in court of claims, and 11 months' delay before filing suit in district court); *Coughlin v. Ryder*, 260 F. Supp. 256 (E.D. Pa. 1966) (Approximately 2 years' delay)." *Baskin* at p. 646-7.

When it is considered that not only did Petitioner fail to commence any action for a period of 24 months, but that he also applied for and has continued to receive public retirement benefits, the correctness of the District Court's and Sixth Circuit's ruling becomes apparent.

II. AS A MATTER OF LAW, PETITIONER WAS AN UNCLASSIFIED EMPLOYEE OF THE CITY OF EASTLAKE. ACCORDINGLY, PETITIONER HAD NO PROTECTED PROPERTY INTEREST IN CONTINUED EMPLOYMENT AND HE SERVED AT THE WILL OF THE APPOINTING AUTHORITY, THE MAYOR.

A. Under the Law of Ohio Petitioner Had No Protected Property Interest.

It is axiomatic that in order to state a claim under 42 U.S.C. §1983 upon which relief can be granted, it is incumbent upon Petitioner to establish a judicially recognized property interest in continued employment. This Court discussed this requirement in *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

> "Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> * * * * *

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 33 L. Ed. 2d 548, 561.

Under the controlling law of Ohio, certain *classified* public employees, by statute, have such a "legitimate claim of entitlement" in continued employment. Section 124.34 Ohio Revised Code provides:

> "The tenure of every officer or employee in the *classified* service of . . . cities . . . shall be during good behavior and efficient service." (Emphasis added.)

No such entitlement, however, exists for public employees in the *unclassified* service. By statutory definition, Petitioner held an *unclassified* public service position. Section 124.11(A)(3) states:

> "(A) the unclassified service shall comprise the following positions, *which shall not be included in the classified service,* and which shall be exempt from all examinations required by this chapter:
>
> * * * (3) . . . the members of all boards and commissions and all heads of departments appointed by the mayor . . ." (Italics supplied.)

As a mayoral appointee in the unclassified service and as the admitted head of his department, Petitioner had no claim of entitlement to continued employment. This long standing principle was set forth by the Ohio Supreme Court in *Knoup, Treasurer v. Piqua Branch of State Bank of Ohio,* 1 Ohio St. 603 (January Term, 1853) at 616:

> "The best illustration of this, perhaps, will appear by comparing the nature of an office in England and any office in America. An office like a franchise is a royal gift: it is considered property in England. Some offices are estates in fee simple, or fee tail; some, estates for life, and some only estates at will. There are some offices, also, which are said to be estates for a term of years, or for one year. And ministerial offices may be granted in revision or to commence at a future period. Some offices are even assignable by deed. But, in America, a public officer is only a public agent or trustee, and has no proprietorship or right of property in his office."

In *State, ex rel. Gordon, City Atty. v. Barthalow*, 150 Ohio St. 499 (1948), the Ohio Supreme Court addressed and resolved the issue of whether a public employee had a property right in his employment:

> "1. A public officer or a public general employee holds his position neither by grant nor contract, nor has any such officer or employee a vested interest or private right of property in his office of employment." *Gordon* at p. 499, Syl. 1.

See also: *Fuldauer v. Cleveland*, 32 Ohio St. 2d 114 (1972), Syl. 3, and *State, ex rel. King v. Emmons*, 47 Ohio App. 348 (Hamilton Co. 1933). Indeed, persons in the unclassified service may be removed or suspended at the pleasure of their superiors. *State, ex rel. Jenkins v. Schneller*, 15 Ohio N.P. (n.s.) 438, 26 Ohio Dec. 171 (1914). 15 OHIO JUR. 3d, *Civil Servants*, §125, Page 101.

Under Ohio law, Petitioner had no property or contract right in continued employment. Accordingly, his claim must fail.

B. Under the Law of Ohio, a Party May Not Create a Jury Issue by Developing Contradictions in His Own Testimony.

Petitioner has attempted to create an issue of fact by attaching a self-serving affidavit to his brief in opposition to Respondents' motion for summary judgment. Ohio law, however, clearly establishes that Petitioner is absolutely bound by the judicial admissions he made during the course of his two depositions. Indeed, no party may create a jury question by pointing to his own conflicting testimony.

> "The testimony of a party to an action necessarily subversive of his interest in the particular action is regarded in all courts as conclusive. In short, a party who becomes a witness is bound by his admissions on the witness stand." 21 OHIO JUR. 2d, *Evidence*, §684.

The Ohio Supreme Court in *Winkler v. Columbus*, 149 Ohio St. 39 (1948), upheld the trial court's direction of a verdict for defendants when plaintiff testified one way during the direct examination and to the contrary on cross-examination. The Court stated:

> "The Court of Appeals assumed that because plaintiff testified one way in chief and contrarily on cross-examination, the case should be left to the jury to choose between the conflicting statements. That would be proper in the case of an ordinary witness, but where the testimony involved is that of the plaintiff and the plaintiff's testimony, whether in chief or cross-examination, discloses negligence on the part of plaintiff contributing directly to her injury, the *fact* has been settled and the matter becomes a question of law to be determined by the court." *Winkler* at p. 44.

In the present case, Petitioner's deposition testimony conclusively establishes that Petitioner served by statutory definition as an unclassified employee.

"Q. In 1976, you were the head of the sanitation department; isn't that correct?

A. Yes, sir.

Q. You held the highest position in the sanitation department; isn't that true?

A. Yes, sir.

Q. There was no one over you? Isn't that true in the sanitation department?

A. No, sir.

Q. The only one you had to answer to was the service director; is that correct?

A. Yes, sir." (p. 21.)

It is clear that at all pertinent times, Petitioner held the position of the head of a department—a position expressly exempted by the Ohio statute from the classified civil service. Since Petitioner was by definition an unclassified employee, he enjoyed no legitimate claim of entitlement and was subject to removal at the pleasure of the Mayor.

CONCLUSION

On August 3, 1978, Petitioner knew that he would be required to retire in six weeks from his position as head of the Eastlake Sanitation Department of the City of Eastlake on September 22, 1978. Even though he now claims that this was a completely unacceptable choice, the fact remains that he failed to take any action until July 31, 1980—a prejudicial delay of almost 2 years to the day. Indeed, instead of contesting the decision of the Mayor, Petitioner applied for and has continued to receive retirement benefits—conduct that is totally inconsistent with the position Petitioner advanced in the Courts below and now advances to this Court.

Under the circumstances of this case, the law of Ohio clearly bars Petitioner's claim. Sound dictates of public policy mandate that public employees press their claim for reinstatement and back pay promptly and responsibly. Indeed, at the date of this writing, the position formerly held by Petitioner has been abolished for almost five years. Petitioner's failure to act and his inconsistent conduct to the prejudice of Respondents bar this action as a matter of law.

Further, Petitioner's position as head of his department, by statutory definition, exempts him from the Ohio classified civil service. In accordance with Ohio law, Petitioner was an unclassified public employee serving at the discretion of the appointing authority. Since existing state law does not support a legitimate claim of entitlement to continued employment, no constitutionally protected property right can exist.

Respondents respectfully submit that the decisions of the District Court and Sixth Circuit Court were correct and Petitioner's request for a hearing on the merits should be denied.

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